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Dec 14 1973
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IN THE COURT OF APPEAL
OF THE STATE OF CALIFORNIA
SECOND APPELLATE DISTRICT
DIVISION ONE

PACIFIC HANDY CUTTER, INC. and DONALD PACE aka DON PACE, Plaintiffs and Appellants vs. CITY OF SOUTH EL MONTE, JOSEPH BUSCH, District Attorney of the County of Los Angeles, and the MUNICIPAL COURT OF THE COUNTY OF LOS ANGELES, EL MONTE JUDICIAL DISTRICT, Defendants and Respondents	Civil No. 41698 (Sup. Ct. No. 42224)

APPEAL from a judgment of the Superior Court of Los Angeles County. Robert A. Wenke, Judge. Affirmed.

Cox, Castle, Nicholson & Weekes and Lawrence Teplin for Plaintiffs and Appellants.

James A. Nicklin, City Attorney, City of South El Monte, Burke, Williams & Sorensen, John H. Larson, County Counsel, Robert B. Reagan, Deputy County Counsel and Royal M. Sorensen, for Defendants and Respondents.

This is an appeal from a judgment of dismissal entered after the trial court sustained defendants' general demurrer to plaintiffs' complaint without leave to amend

The following are the ultimate facts pleaded in the single cause of action of the complaint (which we are required to accept as true [Isrin v. Superior Court, 63 Cal.2d 153, 155; Kliener v. Garrison, 82 Cal.App.2d 442, 445]). Plaintiff Pacific Handy Cutter (hereinafter referred to as Pacific) is a corporation which conducts light manufacturing on premises located in defendant City zoned for industrial and manufacturing uses. Early in 1967 Pacific desired to acquire additional parking facilities and, because no land was available for this purpose in any adjacent area similarly zoned for industrial and manufacturing uses, considered the acquisition of a residential lot located on another street

in the rear of its premises. Pacific thereupon contacted John Lawson, Planning Director of defendant City, and Lyle Larson, a member of City's Planning Commission, and discussed with them the prospects for obtaining an appropriate zone variance or use permit whereby Pacific would be permitted to utilize the residential lot for parking facilities. Both of these individuals assured Pacific that "there would be absolutely no question or problem in obtaining appropriate zoning variances or use permits"; and "based upon the above assurances and statements, Pacific . . . was induced to and did purchase" the residential property. Pacific thereafter made application for a variance and such was approved by City's zoning commission, but subsequently "on appeal by a group of dissident property owners in the immediate area, the appeal was sustained by the City Council and Pacific . . . was not allowed to use the lot for parking. Thereafter, from 1967 to and including part of 1971, the lot was simply a vacant lot and had no use to it whatsoever."

Early in 1971, Pacific acquired another manufacturing company and decided to consolidate both businesses onto one location. Pacific's manufacturing facilities located in defendant City were deemed suitable for this purpose except for a lack of parking space; in the latter respect Lawson and Larson now ". . . advised Pacific . . . that it would be satisfactory for Pacific to construct a parking lot on the [residential] premises . . . and that no problems would occur insofar as zoning or criminal prosecution were concerned." Based upon these representations, ". . . Pacific . . . was induced to and did abandon all further efforts to locate additional facilities . . . and constructed a parking lot on the [residential premises] at a cost of $7,000. Had the foregoing representation not been made, Pacific . . . would not have remained in South El Monte nor constructed the parking lot and allowed its employees to park thereon. . . . Commencing in November, 1971, Pacific . . . began to receive a series of letters from the City of South El Monte advising it that the use of the parking lot . . . was an illegal use." On

or about August 2, 1971, Pacific sold its El Monte real estate, but continued to operate the facilities under a ten-year leaseback agreement. "But for the above representation, Pacific would not have made said lease. . . . As a result of the foregoing conduct, the City of South El Monte is estopped from asserting any violation of the zoning ordinances of the City . . . against the plaintiffs by reason of their use of the subject property as a parking lot."

Subsequently defendant District Attorney brought a criminal action against plaintiffs in defendant municipal court for alleged violation of City's zoning ordinance, titled "People of the State of California v. Pacific Handy Cutter and Donald Pace," number M 75055. This action was still pending at the time the complaint was filed.

In the complaint plaintiffs prayed for an injunction prohibiting the criminal prosecution from proceeding, and for a writ of mandate to compel defendant City to permit Pacific to continue to use the residential property for parking facilities for the duration of the term of its leasehold.

A general demurrer was interposed by all defendants on the single ground that t complaint does not contain sufficient fact to state a cause of action. Relying on certain material sections of the Municipal Code of defendant City,[1] of which it prop erly took judicial notice upon the request of defendants (Evid. Code, § 452, subd. (b City of Los Angeles v. Wolfe, 6 Cal.3d 326, 331 fn. 2; Martin v. City of Corning, 25 Cal.App.3d 165, 168 fn. 1) the trial court sustained the demurrer without leave to amend and subsequently entered a judgment of dismissal of the complaint.

On appeal plaintiffs do not contend that under ordinary circumstances they would, or should, be permitted to continue

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1. "9-2-5.2-A-1 . . . The 'R-M' [residential] Zone is established to provide for the development of multiple family dwelling in a suitable residential environment. . . No lot or parcel in Zone R-M shall be used for any purpose or in any manner other tha as permitted and specified in this Divisio

"9-2-5.2-B-4 . . . The following uses are expressly prohibited in the 'R-M' Zone, . . .

"Commercial Uses

"Industrial Uses"

the operation of a parking lot on the subject "R-M" zoned residential property immune from any remedial procedure by any of the defendants, including the pending criminal prosecution; they urge, however, that they do state a cause of action in the complaint, for it sufficiently pleads their right to exceptional treatment in that defendants are "estopped" from enforcing against them the limitations and restrictions of the sections of City's Municipal Code by reason of the representations of Lawson and Larson as averred in the pleading.

It is, of course, true that the theory of estoppel may in some instances be invoked against governmental agencies in relation to zoning matters one of the requisites being sufficient averments, which we here find in the complaint, of the following elements: the agency must be apprised of the facts; the landowner must be ignorant of the true state of the facts; the agency must have intended that its conduct be acted upon, or so act that the landowner had a right to believe that it was so intended; and the landowner must rely on the conduct to his prejudice. (See City &

County of San Francisco v. Meyer, 208 Cal. App.2d 125, 132; City of San Marino v. Roman Catholic Archbishop, 180 Cal.App.2d 657, 677.) However, as conceded in appellants' opening brief such estoppel against government agencies is rarely invoked, and only under unusual circumstances (City etc. of San Francisco v. Burton, 201 Cal.App.2d 749, 756; Donovan v. City of Santa Monica, 88 Cal.App.2d 386, 394), and not if to do so would expressly defeat policy adopted to protect the public, as is particularly set out in statute or ordinance.

In Magruder v. City of Redwood, 203 Cal. 665, a criminal action was brought against the plaintiff for maintaining a lumberyard within the environs of defendant City in violation of a city ordinance. While the criminal cause was pending plaintiff brought an action to enjoin further prosecution or other proceeding designed to terminate his operation of the lumberyard. One of the grounds urged by him was waiver and estoppel based on the circumstance, ". . . that as he had received a permit from the trustees [City's governing body] to erect the building in which he conducted his lumber-yard

. . . the board of trustees thereby repudiated and violated the ordinance and are now in no position to enforce the same." (P. 674.) The Supreme Court said at pages 674-675: ". . . That matter, therefore, is resolved down to the question whether the board of trustees by granting a permit to erect the second building . . . which use was contrary to the terms of the ordinance, thereby placed themselves in a position that prevented them from thereafter enforcing the terms of the ordinance which prohibited a lumber-yard from being operated within the residence district. Appellant contends that they have. He cites no authority to support his contention, and we are not seriously impressed with it. We know of no power possessed by a board of trustees that will permit it in any such manner to nullify a legal ordinance adopted by the municipality. An ordinance of a municipality when once legally adopted becomes binding upon all the citizens thereof, officers as well as private citizens, and it is the sworn duty of those officers, charged with its enforcement, to prosecute all violations thereof. This duty is not

a personal duty that can be waived at their will, nor can they be estopped by any action of theirs from the faithful performance of the same. There is no merit in this contention of appellant." (Italics added.)

Likewise in City of Fontana v. Atkinson, 212 Cal.App.2d 499, defendant operated a dairy located within the incorporated area of plaintiff City; he planned additional construction on his premises and for this purpose had specifications drawn up which he submitted to the County Health Department and to City's Planning Department; the director of the latter wrote thereon "'Approved [signed] R. Garrod 7-28-60 City Planning Commission per telephone conversation with City Attorney 7-28-60 10 A.M.'" (P. 502.) Subsequently defendant was issued a building permit for this construction by City's building inspector; nevertheless, immediately after the work was commenced, City issued a "stop" order, but defendant declared his intention to proceed whereupon plaintiff sued for an injunction. On its findings that plaintiff City was barred by estoppel and waiver, the trial court refused to issue an injunction; we reversed

with directions to enter judgment for City; and said on the issue of waiver (pp. 507-508): ". . . [City] Ordinance No. 2110 provides that no nonconforming use shall be altered, extended or restored so as to displace any conforming use. [Citation.] In Western Surgical Supply Co. v. Afflect, 110 Cal.App.2d 388 [242 P.2d 929], it was held that a board or official has no power to waive or consent to violation of penal provisions in the Health and Safety Code and the Business and Professions Code. See also volume 51, California Jurisprudence, Second Edition, Waiver, section 5, page 313, note 19; Caminetti v. State Mut. Life Ins. Co., 52 Cal.App.2d 321 [126 P.2d 165]; Magruder v. City of Redwood, 203 Cal. 665 [265 P. 806]; Lima v. Woodruff, 107 Cal. App. 285 [290 P. 480]; and County of San Diego v. California Water etc. Co., 30 Cal. 2d 817 [186 P.2d 124, 175 A.L.R. 747], where it was held that neither the doctrine of estoppel nor any other equitable principle may be invoked against a governmental body where it would operate a defeat the effective operation of a policy adopted to protect the public. See also volume 1,

American Law Reports, Second Edition, Estoppel--Governmental Bodies, sections 2 and 3, pages 340-341, and cases cited therein." (Italics added.)

Plaintiffs cite numerous cases in their opening brief, but each is entirely distinguishable factually; none relates to a claim of estoppel or waiver invoked against a governmental agency in derogation of any statute, or ordinance, much less a zoning regulation.

Furthermore plaintiffs seek by means of the complaint to enjoin defendants District Attorney and municipal court from proceeding with the criminal prosecution commenced against them. It is settled that an injunction will not issue against prosecuting authorities in the absence of any allegation that the statute or ordinance under authority of which the criminal action is being prosecuted is invalid. (Pitchess v. Superior Court, 2 Cal.App.3d 644, 648; Manchel v. County of Los Angeles, 245 Cal.App. 2d 501, 506-507; Fairchild v. Brock, 88 Cal. App.2d 425, 429.) Plaintiffs cite no case to the contrary.

The judgment is affirmed.

LILLIE, J.

We Concur:

WOOD, P.J.

HANSON, J.